No. 76-641

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

P. C. PFEIFFER COMPANY, INC., AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

AYERS STEAMSHIP COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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These cases present the question whether waterfront workers receiving cargo from land transportation at piers or terminals for export, or delivering cargo to land transportation after its discharge from ships, are "employees" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3).[1]

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[1]The term "employee" means "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

The same question is presented in *Northeast Marine Terminal Co.* v. *Caputo*, No. 76-444, and a closely related question is presented in *International Terminal Operating Co.* v. *Blundo*, No. 76-454, in which petitions for writs of certiorari were granted on December 6, 1976.

The worker in *Caputo* was injured while loading cargo into a consignee's truck on a pier. This is functionally the same work respondent Ford was doing when injured; similar principles should govern the case of respondent Bryant, who was injured while unloading cargo from a shipper's truck in preparation for shipment by water.

In *Caputo* the regular duties of the injured worker encompassed all aspects of waterfront cargo-handling, including the immediate loading and discharge of ships; the regular duties of the injured workers in these cases, by contrast, were limited to stages of the cargo-handling process other than the immediate loading or discharge of ships. It is therefore possible that the Court's disposition of *Caputo* will not control these cases; the Court may conclude, as did the Second Circuit in *Caputo*, that the worker's general occupation and employment status as a "longshoreman" brought him within the Act's coverage of "any longshoreman or other person engaged in longshoring operations," even though he was not doing longshore work when injured. If the Court were to affirm in *Caputo* on that reasoning, it would not reach the question presented here.

Although *Caputo* will not necessarily control this case, a disposition on any ground other than the one just discussed would do so. Moreover, the Court's rationale in *Caputo* and *Blundo* may well establish the proper result here even if the holdings do not. We therefore

believe that consideration of these cases should be deferred pending disposition of *Caputo* and *Blundo*.[2]

Respectfully submitted.

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[2]Petitioners present three subsidiary questions (Pet. 3-4, 33-37) that do not independently warrant review by this Court. Petitioners' argument that the court of appeals gave excessive deference to the Benefits Review Board is belied by the fact that it set aside the Board's decisions in two of the five cases that were consolidated for review (see Pet. App. 18-21). Such differences as there may be among the courts of appeals in the articulation of a standard of deference appear to be largely semantic. The questions concerning the application of the presumption of coverage contained in 33 U.S.C. 920(a) arise primarily when there are factual disputes (or an absence of proof on a particular fact) rather than when, as here, there is a dispute concerning the interpretation of the language of the statute. The court of appeals correctly answered (Pet. App. 29-30) petitioners' arguments concerning the award of attorneys' fees for services rendered before the Board. Petitioners' contention (Pet. 36-37) that this conflicts with the decision of the Third Circuit to require additional proceedings prior to an award of fees for services in a court of appeals is insubstantial; the Board has a better opportunity personally to observe the performance of counsel, and the Fifth Circuit now has adopted the Third Circuit's procedure for assessment of fees for services performed in the court of appeals. *Ayers Steamship Co.* v. *Bryant*, C.A. 5, No. 75-4112, decided January 3, 1977.